

**STATE OF MICHIGAN  
IN THE SUPREME COURT  
In Re: Certified Question  
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**In Re: Certified Question (Mattison v Commissioner WD Mich 4:05-CV-79)**

**Case No.: 144385**

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**BRIEF ON APPEAL**

144385

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**ORAL ARGUMENT REQUESTED.**

**FILED**

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***Statement Identifying the Stipulation Appealed From***

- a.** The parties are appealing pursuant to a stipulation certifying a question to the Michigan Supreme Court.

## ***Jurisdictional Statement***

### **a) The Supreme Court's Jurisdiction**

This is an appeal pursuant to MCL 600.215

*Statement of Issues*

**Issue 1: Whether M.M. and M.M., conceived after the death of Jeffery Mattison via Artificial insemination using his sperm, can inherit from Jeffery Mattison as his children under Michigan intestacy law?**

**Appellant would answer: "YES".**

### *Statement of Facts*

Jeff and Pam Mattison were married on November 4, 1995. (A. 202, T. 10)

One child, Jenna was born on February 20, 1998. This child was born with the aid of reproductive technologies. (A. 198, T. 6)

Jeff Mattison had lupus, diabetes, high blood pressure, and kidney failure. (A. 198 and A. 202, T.6 and 11)

The Mattison's decided to have more children. Medically, they had to wait 18 months before they could start the process of artificial inseminations.

Initially, those inseminations were not successful. Jeff Mattison contributed greatly to this process in that in order for his sperm to be taken and stored, he had to stop taking the medications for his own illnesses. Otherwise, the couple risked defect in the sperm. (A. 198, T.6)

The Mattison's continued with the in vitro process through 1999, 2000 and 2001. (A. 199, T. 7) Jeff Mattison's assistance continued throughout. (A. 201, T.9) In fact, Mr. Mattison paid for the process, which was not inconsequential since his pay was their only income. (A. 207, T. 15).

Some of his assistance was injecting Pam Mattison with hormones on a daily basis. These injections were necessary in order to allow Pam's eggs to be harvested. (A. 201, T.9)

On January 17, 2001 during the evening, Jeff Mattison injected Pam Mattison with the medications in order to prepare her for the harvesting of her eggs. (A. 201, T. 9)

On January 18, 2001 at approximately 8:25am, Pam Mattison came downstairs to find Jeff Mattison apparently dead in his easy chair. While paramedics attempted to

resuscitate him, Pam Mattison took another preparatory injection at approximately 9:00am. (A. 205, T.13)

Pam Mattison continued with the In Vitro program, and on January 28, 2001, underwent egg retrieval. These eggs were inseminated with Jeff Mattison's frozen sperm, and were transplanted on January 30, 2001. (A. 208 and A. 209, T. 16 and T. 17)

Jeff Mattison had left a power of attorney (A. 90) dated May 18, 1998 allowing Pam Mattison to take "any and all action necessary pertaining to any sperm or embryos I may have stored including their implantation or termination."

This transplant process resulted in the births of Mallory and Michael Mattison, who were born on October 8, 2001. (A.197, T.5)

The commission denied Petitioner's request for social security benefits on December 9, 2002.



## *Argument*

**Issue 1: Whether M.M. and M.M., conceived after the death of Jeffery Mattison via Artificial insemination using his sperm, can inherit from Jeffery Mattison as his children under Michigan intestacy law**

**Appellant would answer: “YES”.**

### **a. Argument**

MCLA 700.2104 provides as follows:

An individual who fails to survive the decedent by 120 hours is considered to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent’s heirs are determined accordingly...

The basic argument of the Commissioner is that the children were not alive 120 hours after Jeff Mattison’s death. Therefore, they could not inherit from Jeff Mattison and are not eligible for social security benefits.

First, appellant/claimants would cite the United States Court of Appeals for the 9<sup>th</sup> Circuit case of Netting v. Barnhart, No. 03-15442 as persuasive authority. There the Court noted “developing reproductive technology has outpaced federal and state laws, which currently do not address directly the legal issues created by posthumous conception.” Netting, supra, at page 7565.

Unfortunately, that thought applies directly to review of the Michigan law pertaining to this issue. However, as in Netting, supra, the Commissioner uses nearly identical reasoning to attempt to withhold benefits from Michael and Mallory.

The Netting court held that the ways for a parent to acknowledge paternity did not apply if paternity was not disputed. It does not seem that anyone seriously

disputes Michael and Mallory being children of Jeff Mattison. Instead, the Commissioner seems content to use legal niceties to deny these children benefits. These niceties included that the children not be able to inherit from Jeff Mattison because they were not alive at his death.

But, even if the Commissioner were to dispute actual biological paternity, it could have been easily proved that these were Jeff Mattison's children. Their birth came about because Jeff Mattison's frozen sperm was used to fertilize the eggs of Pam Mattison. This fertilization took place at the hands of a medical doctor. Additionally, the implantation in Pam Mattison's uterus took place at the hands of the same medical doctor. Barring a mishap, it is difficult to imagine much more certain paternity as it actually took place outside of Pam Mattison's body where it could be watched and witnessed.

**1) Did Jeff Mattison acknowledge the children in writing?**

As was previously stated, Jeff Mattison did acknowledge that he had frozen sperm samples. He authorized his power of attorney to take whatever measures necessary, including their implantation.

Obviously, Jeff Mattison knew children could result from his frozen sperm, even after his incapacitation, and possibly death. Under an expansive interpretation of the word "acknowledged", Jeff Mattison in writing acknowledged the possibility of later conceived children. Accordingly, these children should not be denied the opportunity to inherit through him.

**2) Could these children inherit from Jeff Mattison?**

**a) Were these children conceived during the marriage?**

First, it is undisputed that a child conceived during a marriage could inherit from both parties. In Re KH, 122666, 67 N.W. 2d 800 (2004). In addition, “The presumption that children born or conceived during a marriage are issue of that marriage is deeply rooted in our statutes and case law,” In Re KH, supra.

Secondly, while the actual meeting of sperm and egg did not take place during the marriage, the preparations for conception took months, if not years of activity during the marriage. As Pam Mattison stated during her testimony, Jeff Mattison had to stop taking his medications for a period of time in order that his sperm could be taken.

In addition, Pam Mattison underwent months of grueling injections and procedures in order to have her eggs harvested for the moment of conception. Jeff Mattison funded this, and was an active participant in the process until within hours of his untimely death.

Conception, in this case, was actually a process of conception. No one act could have been left out of this formula with the result being the birth of these children. Thus, the conception took place during the marriage. Pam Mattison could not have simply called the doctor, without the preparatory work being done, and had these embryos implanted.

Pam Mattison’s body had to be made ready, not only to obtain her eggs, but for their implantation. Jeff Mattison’s efforts in this process were necessary and important in the process of conception. His sperm was taken and preserved

during the marriage. Thus, the children are legitimate and able to inherit because their conception process took place during the marriage.

Also, as the Court stated in In Re KH, supra, "This presumption of legitimacy, most recently reaffirmed In re CAW, has been consistently recognized throughout our jurisprudence, and can be overcome only by a showing of clear and convincing evidence". Certainly, clear and convincing evidence that these children are not Jeff Mattinson's cannot be presented.

It would also seem that a reasonable extension of Michigan law would legitimize these children. MCL 33.2824(6) states, "A child conceived by a married woman with the consent of her husband following the utilization of assisted reproductive technology is considered to be the legitimate child of the husband and wife."

Jeff Mattison consented to the reproductive technology through his words in the power of attorney and his actions by assisting her in the administration of injections and otherwise. Jeff Mattison's participation in the conception process before his death legitimizes the children, similar to that envisioned in MCL 33.2824(b).

Lastly, Claimants would cite the case of Aichele v. Hodge 259 Mich App 146, 673 N.W.2d 452 (2003). There the Court stated at page 158 as follows:

Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had no access to his wife during the relevant period.

Jeff Mattison was the only one who had access to his wife during the critical period albeit it was after his death. He had access because it was

only his sperm taken during his life and with his consent that was used to fertilize her eggs.

Aichele, supra continues at page 158,

Accordingly, the presumption of legitimacy still permeates Michigan law...the Legislature has for 182 years now chosen to protect this "sanctity", and that choice prompts its preference to avoid a challenge to presumed legitimate birth until a prior determination rebuts legitimacy and threatens the child's support by exposing the fact that the presumed father is not the biological father.

**b) Could these children inherit as illegitimate children of Jeff Mattison?**

No estate has been opened for Jeff Mattison as there was no need to probate his jointly owned assets to his wife. The Commissioner states that the children could not inherit because they were not alive when he died. Literally, they did not survive him.

But, these children are his biological children. In Re Quintero Estate, 224 Mich. App. 682, 569 N. W. 2d 889 (1997), quoting MCL 700.11, MSA 27.5111(4) states as follows on page 688 as follows:

The biological father of a child who is born out of wedlock...shall be considered to be the natural father of that child for the purpose of intestate succession from the father to the child only...

If an estate for Jeff Mattison was opened now, these children would be able to file claims against and would be considered to be heirs.

**c) Could a paternity action be opened now on behalf of the children to legally establish paternity of the children by Jeff Mattison?**

MCL 700.111(4), MSA 27.5111(4) provides as follows:

4(d) the man has been determined to be the father of the child and an order of filiation establishing that paternity has been entered pursuant to the paternity act.

A paternity action could be filed on behalf of these children. Because of the aforementioned use of Jeff Mattison's semen, his paternity would seem to be a forgone conclusion. Such an action should not be necessary, however, since no one disputes that these are his children.

If that is the case, there is no reason why the children should not be recognized as children for the purpose of obtaining benefits pursuant to the act.

**c. Relief requested**

Claimant would request that the Court determine that these are children that could inherit from Jeff Mattison.

**d. Conclusion**

M. M. and M. M. are the biological children of Jeff Mattison, who died more than 120 hours before they were born. Claimant/Appellants would argue that the process for these children's birth began long before Jeff Mattison's death since Jeff Mattison plainly acknowledged through his power of attorney that there may be children born after his death and the general in vitro process takes months of preparation. Jeff Mattison actively participated in that process including administering a preparatory shot to Pam Mattison the night before he died. It is a reasonable extension of Michigan law to allow these children to inherit from him since they could do so if a paternity action was opened and the legislature has enacted statutes regarding in vitro fertilization and legitimacy.

Respectfully submitted by:

A handwritten signature in black ink, appearing to be 'V. L. Bland', written in a cursive style.

VICTOR L. BLAND